82397-9

No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF SHORELINE, a Washington municipal corporation, and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,

Petitioners

v.

DOUG AND BETH O'NEILL,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF WSAMA

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I. INTRODUCTION

WSAMA asks this court to accept review of this case and address the following three issues: "(1) Whether metadata per se is a public record, even in the absence of a showing that it relates to the conduct of government; (2) Whether metadata that cannot be viewed or retrieved by a typical agency employee is an identifiable public record; and (3) Whether deleted electronic records constitute identifiable public records under the PRA." WSAMA Brief, at p. 2.

The first of these issues is only remotely aligned with issues the petitioners raised in their petition for discretionary review, and as discussed below, is so broad that on this record there simply is not adequate facts upon which this court might base its reasoned decision.

The second enumerated issue raised by WSAMA is an entirely new issue not raised in this matter before now, and on this record does not present a controversy that this court can or should resolve. Finally, while WSAMA's third issue – whether deleted electronic records constitute identifiable records under the PRA – is consistent with an issue raised in the Petitioners' request for review, without further development of proof – via expert and lay testimony – this Court has little beyond speculation and conjecture

to base any decision on, and thus this question too is not ripe for review.

One of the Respondents' top priorities in this litigation is to enhance the integrity and effectiveness of the Public Disclosure Act – to make sure that it continues to provide, particularly in the evolving area of electronic records, "a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). Under the Spartan facts of the case as it has thus far developed, the Court of Appeals' decision is consistent with this mandate, and until the record develops further, this Court should deny review and allow the matter to mature at trial, where a trial judge is better situated than this appellate tribunal at resolving disputed what invariably will be issues of fact.

II. THE PURPOSE OF THE ACT GUIDES ITS APPLICATION.

The Public Disclosure Act contains perhaps the most lofty and emphatic statements of purpose of any law in Washington State. This language is not simply meant to inspire; it guides judicial construction of the Act. "Declarations of policy in the act, although without operative force in and of themselves, serve as an important guide in determining the intended effect of the operative

sections." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

The Act emphasizes the inexorable link between citizen access to information and a free, democratic society.

> The public disclosure act was passed by popular initiative and stands for the proposition that, 'full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. RCW 42.17.010(11).' The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251.

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d 243, 250-51, 884 P.2d 592 (1994). As this Court has noted, "The Legislature leaves no doubt about its intent:"

> 'The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exceptions narrowly construed to promote this public policy. RCW 41.17.251.'

Progressive Animal Welfare Society v. University of Washington, 125 Wn.2d at 260.

Three times the Act mandates liberal construction to assure "full access to public records." RCW 42.17.010(11); RCW 42.56.030; RCW 42.17.920. Where the Act addresses the responsibility of public agencies to provide "full public access," it repeatedly uses the plural "public records," meaning all public records must be made available. RCW 42.56.070 and .080 (mandate to make records available); RCW 42.56.090 (timing); RCW 42.56.120 (fees). In its published decision, the O'Neil court relied on this plain statutory language in defining what a "public record" is:

> any ***writing*** containing information ***relating to*** the conduct of government or the performance of any governmental or proprietary function prepared, ***owned, used, or retained*** by any state or ***local agency*** regardless of physical form or characteristics.

O'Neill, at 922-923, emphasis in original, quoting former RCW 42.17.020(41) & current RCW 42.56.010(2).

The court went on to say that a "writing" is defined as:

> handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all

> papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

O'Neill, supra, (citing former RCW 42.17.020(48) (2006) (noting that the 2007 amendments to RCW 42.17.020 and to RCW 42.56.010 did not affect the definition of "writing.")

Because the metadata requested falls squarely into the definition of "writing," and the "writing" falls squarely into the definition of a public record, the court of appeals appropriately resolved WSAMA's first issue. Beyond hypothetical facts prospectively proffered by amici and the parties, there is nothing for this court to decide as a matter of law.

III. THE ISSUES RAISED BY WSAMA ARE NOT RIPE FOR REVIEW.

As mentioned above, two of the issues raised by WSAMA are largely unique to WSAMA alone, and all three of the issues raised by WSAMA are animated more by speculation than by adjudicated fact. It is well settled law that appellate courts in Washington will not address issues raised only by amicus. State v. Taylor, 150 Wn.2d 599, 603, 80 P.3d 605, 608, (2003), *citing* Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622,

631, 71 P.3d 644 (2003). It is equally settled that this court will not render advisory opinions. *Cooper v. Department of Institutions*, 63 Wn. 2d 722, 724, 388 P.2d 925, 926 (1964).

At least four times the O'Neill court complained about the inadequacy of the record:

> On this record, we cannot tell whether the hard drive of the deputy mayor's computer contains metadata associated with the September 18 e-mail that would be responsive to the request. The trial court shall determine the answer to that question on remand.

O'Neill v. City of Shoreline, 145 Wn. App. 913, 936, 187 P.3d 822, 832 (2008)).

> This record does not tell us whether that forwarded e-mail had with it the same metadata that O'Neill sought or whether the City could provide the metadata from the forwarded e-mail to her in response to her request. Whether the metadata is the same or different is a question this court cannot answer. We leave it for decision by the trial court on remand.

Id.

> The trial court should also consider on remand whether the e-mail Thwing resent to the deputy mayor contains the requested metadata. Again, we cannot tell on this record whether it does.

Id.

> O'Neill appears to rely on RCW 42.56.100 as a basis for claiming the City violated the PRA. Reply of Appellants to Brief of City of Shoreline at 2-3. Because the record is unclear on when an electronic

> version of the September 18 e-mail was destroyed, we cannot address whether the PRA was violated in this respect.

Id., at fn. 63.

Given the dearth of facts below, the Court of Appeals necessarily remanded the matter to trial for further development of proof in accord with its opinion. WSAMA's second issue in particular, "Whether metadata that cannot be viewed or retrieved by a typical agency employee is an identifiable public record" depends for its resolution upon factual testimony by records custodians and other experts, none of which is available in the record. Only after facts are developed in a trial court will this or another appellate tribunal know what a "typical agency employee" is, whether "typical agency employees" need or have occasion to view metadata during the course of their day, or whether the agencies' duties under the PRA are best consummated in training its employees responsible for responding to requests for public records so that they are able to view and provide metadata. Indeed, whether the metadata is visible to a typical employee or not begs the real issue when the agency can simply and economically provide masses of electronic records to the requesting party for not much more than the price of a CD.

Finally and similarly, WSAMA asks this court to resolve the question "Whether deleted electronic records constitute identifiable public records under the PRA." But there is little if any hard evidence in the record as to the character, storage, retrieval and ultimate destruction of electronic data, both before and after "deletion." Indeed, it does not take a computer forensics expert to understand the well known fact that unlike shredding of a paper record, "deletion" of an electronic record ordinarily does not result in destruction of the electronic record. This court need look no further than the matter of Oliver North and the Iran-Contra affair, where the Tower Commission disinterred upwards of 700 "deleted" emails, and Monica Lewinski's highly publicized affair with former President Clinton, details of which came to light after special investigator Kenneth Starr "undeleted" her correspondence dating back as far as two years.

In sum, without development of critical facts, without expert and lay testimony which can only be garnered at trial, this court has little if anything to go on in resolving WSAMA's issues.

IV. CONCLUSION

WSAMA couches its concerns in speculation and conjecture, which at turns is both reasonable and hyperbolic. However, their

real concerns seem to be with having to move their document delivery systems into the 21st century, and with the practical implications of applying the O'Neill decision. Several considerations bear on their real concerns.

1. The job of the Court is to apply the Act as it is written by the people and the legislature and to construe it liberally to accomplish its purpose, not to rewrite the Act to calm anticipatory fears of those whom the Act was meant to govern.
2. The Act has been in effect for over thirty years, and while it has caused some governmental consternation, as was certainly anticipated, it has not caused major disruption.
3. If applying the Act as written causes unmanageable problems or unacceptable financial consequences, government agencies have a strong presence in Olympia and should have no problem getting the Legislature's attention.
4. As more Public Disclosure Act cases involving electronic data are decided, public agencies should have an ever-clearer picture of what is required to comply with the Act and should be able to adjust their conduct and delivery systems accordingly.

5. Agencies can protect themselves by having efficient indexing and retrieval systems, well-trained personnel and a cooperative attitude toward public disclosure requests.
6. Agencies can also protect themselves by taking more time, as allowed by RCW 42.56.520, to assess potentially applicable exemptions, perhaps even including expedited judicial review.

For the foregoing reasons, the respondents respectfully request this court deny review of the decision of the Court of Appeals, and send this matter back to trial.

DATED this 2nd day of February, 2009.

/s/ Michael G. Brannan
Michael Brannan, WSBA #28838
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I've just been informed that the respondents' Answer to WSAMA filed earlier was sent up without the Table of Contents or Table of Authorities attached. I apologize for the error and inconvenience. Please substitute the attached document, which is identical to the previous filing but for the inclusion of the two missing pages.

Thank you for your time and attention. Made substitution - acl

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Dear Clerk of the Supreme Court,

Attached please find Respondents' Response to Memorandum of Amicus Curiae WSAMA.

If you have any questions or concerns, please do not hesitate to contact the undersigned. Thank you for your courtesies and cooperation.

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